

### 13 Official Opinions of the Compliance Board 27 (2019)

- ◆ 2(D)(2) Notice Method - Practice Permitted. Website Notice, use of calendar function (No Violation)
- ◆ 4(G)(2) Closed-session Discussion – Legal Advice – Within Exception. Advice on legal implication of anonymous employee misconduct complaint (No Violation)
- ◆ 4(G)(2) Closed-session Discussion – Legal Advice – Within Exception. Advice on legal implication of issues related to federal investigation and LEOBR statute (No Violation)
- ◆ 4(G)(3) Legal Advice - Outside of Exception. Topics beyond the rendering of legal advice (Violation)
- ◆ 4(N)(2) Closed-session Discussion – Procurement – Outside Exception. Negotiation strategy not involving competitive bidding or proposals (Violation)
- ◆ 5(C) Written Closing Statement - Generally: Guidance on use of pre-prepared statement (Violation)
- ◆ 6(D)(1) Open Session Minutes – Summary of Prior Closed Session - Generally. Written summary alone insufficient if video minutes are the public body’s “minutes” (Violation)
- ◆ Violations: §§ 3-301, 3-305(b) & (d), 3-306(c)(2)

\*Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at [www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx](http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx)

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May 14, 2019

#### Re: City of Taneytown

The complaint alleges that the Mayor and Town Council of the City of Taneytown violated multiple provisions of the Open Meetings Act with regard to meetings on February 9, 2019, September 10, 2018, and October 3, 2018.<sup>1</sup>

#### *1. Allegation that the Council violates the Act’s notice requirement*

The complaint speculates that the Council’s sole method of providing notice is online. The complaint then asserts that the Council’s online notice is incomplete because— even though all of the required information and a link to the agenda appear on the City’s online events calendar— another part of the website does not specify all of that information. The complaint does not address the Council’s other methods of giving notice.

We find that the City’s notice on the events calendar complies with the Act. Moreover, when a public body uses multiple ways of posting notice (a practice that we recommend), a complaint about only one of those methods seldom states a violation of the Act. *See* 13 *OMCB Opinions* 9 (2019) (finding no violation where website notice lacked some information, because the public body had

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<sup>1</sup> The complaint additionally contains commentary on website design. Constructive suggestions about website design should be made directly to the public body’s members or webmaster, as they (and not this Board) are in a position to address them.

given reasonable notice by another method). The Act does not require public bodies to have websites, does not require them to post notice online, and does not micromanage the way in which a public body organizes its website when it does use it for posting notice. *See* § 3-302<sup>2</sup> (providing that a public body “may” post meeting notices in various ways, including posting them on a website that the public body ordinarily uses to provide information to the public).<sup>3</sup>

The submissions do not establish a violation of the notice requirement set by § 3-206. We commend the Council for using multiple methods of providing notice and for making its agendas available through a link on the events calendar.

## ***2. Allegations regarding the Council’s preparation of a written closing statement before it closes its meetings***

Before closing a meeting, the public body’s presiding officer must prepare, or approve at the time of the vote to close, a written statement (“closing statement”) that contains three items of information: a citation to the provision of the Act that permits the closed session, a list of the topics to be discussed, and a statement of the reasons for discussing those particular topics in closed session. § 3-305(d). It appears that, until late 2018, the Council’s closing statements routinely omitted the Council’s reasons for closing the meeting and sometimes omitted the topic. The October 10, 2018 closing statement, for example, merely recites the words of the statutory exceptions. The Council thus violated § 3-305(d) by omitting some of the required information.

Now, the Council uses the model closing statement posted on the open meetings webpage of the Attorney General’s website. That form has been formatted in such a way as to prompt the preparer to include the required information for each topic to be discussed. Using the February 9, 2019 form as an example, we see that the reason for closing is no longer omitted. Still, because the form is apparently pre-prepared for the Council, our prior guidance on the use of pre-prepared closing statements might be useful. In a nutshell, we have encouraged public bodies to consider, when voting to close, whether the form adequately states the Council’s own reasons for excluding the public from the discussion, as the discretionary decision to invoke an exception lies with the members of the public body, not with staff. *See, e.g., 10 OMCB Opinions* 85, 87 (2016) (“The decision to close lies with the members of the public body, and staff does not necessarily know in advance why, or even whether, the members will want to close the meeting.”); *see also* §§ 3-305(b) (permitting, but not requiring, a public body to close a meeting under the exceptions provided there), 3-305(d) (requiring that a majority of the public body’s members, by recorded vote, vote to close). We also refer the Council to Chapter 5 of the Open Meetings Act Manual for its guidance on describing topics and reasons for closing and for its “Practice notes on avoiding closing statement violations.”

## ***3. Allegations regarding the Council’s closed-session summaries***

When a public body has closed a meeting under § 3-305, it must include, in the minutes of its next open session, a summary of the closed session that contains certain information. § 3-306(c)(2).

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<sup>2</sup> Citations are to the General Provisions Article of the Maryland Annotated Code (2014, with 2018 supp.).

<sup>3</sup> We encourage the complainant to consult the Chapter Summary for Chapter 2 of the Open Meetings Act Manual, as that summary spells out the information a person needs to “figure out whether a public body gave proper notice.”

As we explained in 10 *OMCB Opinions* 57, 60 (2016), a public body may adopt as its closed-session summary a separate document (often a closing statement updated to show what actually occurred), so long as that document is attached to the open-session minutes, or, if the minutes are posted, the minutes contain a link to it so that the public can find it. *Id.*<sup>4</sup>

Here, the Council publicly adopts a summary, or “record,” of each closed session. Judging by the documents submitted to us, the summary provides the requisite information in considerable detail, and the presiding officer reads it aloud in open session, which the public can view on video. Formerly, the Council adopted the written summary as a document separate from the open-session minutes and did not incorporate the summary into the minutes. The Council now includes the closed-session record in its open-session minutes.

As noted by the complainant, the detail that the Council provides in its summaries shows that the Council “follow[ed] the Act’s intentions” regarding the disclosure of the events of its closed sessions. However, the Council’s former practice fell slightly short of compliance with the Act and therefore violated § 3-306(c)(2).

**4. *Allegations that the Council’s discussions in its September 10, 2018 and February 9, 2019 closed sessions exceeded the exceptions cited as authority for the sessions***

The Act requires public bodies to meet publicly unless the Act expressly provides otherwise. § 3-301. Section 3-305 provides fifteen express exceptions to that openness requirement. Once a public body has closed a meeting in reliance on one or more of those exceptions, as listed on the written closing statement, the members may not discuss, during that session, matters that do not fall within the listed exception or exceptions. § 3-305(b), (d). Here, the complaint alleges that the discussions in the Council’s September 10, 2018 and February 9, 2019 closed sessions exceeded the scope of the legal advice exception, which generally allows a public body to receive legal advice on an issue in closed session but requires them to consider the issue in open session unless another exception applies and has been cited on the closing statement. *See* Open Meetings Act Manual, Ch. 4, Part G. The complaint omits the fact that § 3-305(b)(7) was not the only exception that the Council relied on to close the meetings.

September 10, 2018 meeting. On September 10, 2018, the Council closed its meeting to discuss how to handle an anonymous letter in which someone alleged that city police department employees were engaging in misconduct. The Council cited two exceptions as authority for closing that meeting: § 3-305(b)(7) (the legal advice exception) and § 3-305(b)(8), which permits a closed session to discuss pending or potential litigation with staff, consultants, or others. We find that the meeting, at which the Council both received legal advice and discussed the allegations, fell within §

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<sup>4</sup> When the public body keeps its official minutes in the form of live and archived audio or video streaming, an oral summary suffices if it contains the necessary information. 11 *OMCB Opinions* 47, 50 (2015). In our view, a public body that keeps written minutes as its official minutes and also keeps audio or video of its meetings may provide the summary in the written minutes by incorporating the audio or video clip of an oral summary by reference and telling the public how to access it. The goal is to enable a person who is reading (or watching or listening to) the open-session minutes to find the closed-session summary that the public body has adopted.

3-305(b)(8), concerning potential litigation, as well as § 3-305(b)(7). However, it is not clear that the discussion was subject to the Act at all, or whether, instead, it fell within the administrative function exclusion to the Act. Because this particular municipality's charter places with the Council the authority to "operate and maintain a police force," the handling of the anonymous letter may well have fallen within the Council's administrative function. If that was the case, the constraints set by § 3-305 did not apply to the discussion, and § 3-104, requiring certain disclosures, would have been the only provision of the Act that did apply. *See* § 3-103(a)(1)(i) (providing that the Act does not apply when the public body meets only to perform an administrative function); *see also, e.g.,* 1 *OMCB Opinions* 6 (1992) (applying the exclusion to county council's discussion about "aspects of the operation of [a] hospital" subject to the council's oversight); 2 *OMCB Opinions* 1 (1998) (applying the exclusion when the city council, in "exercising its general oversight responsibilities" over municipal election board, addressed a citizen group's objections to an election board decision); 6 *OMCB Opinions* 23 (2008) (school board's receipt of briefing on internal audit fell within the administrative function because it was fell within the school's board's oversight responsibilities, "did not go beyond reviewing current operations," and did not "result[] in any suggested changes in policy.") Either way, the Council's discussions during the September closed session did not violate the Act.

February 9, 2019 meeting. In late January 2019, the city's police chief resigned; according to news reports, he had been charged with transferring and possessing illegal machine guns in violation of federal laws. On February 9, 2019, the Council held a closed session to discuss two sets of topics that pertained to the conduct and operations of the police department.<sup>5</sup> The Council cited two exceptions. First, the Council cited § 3-305(b)(1), which permits a closed session to discuss personnel matters that pertain to an individual employee, to discuss "the resignation of the Police Chief and status of Police personnel, and vacancies related thereto." The Council also cited § 3-305(b)(7) for the receipt of legal advice "on FBI investigation related to the City Police Department" and stated that the "[d]iscussion of the legal implications of the FBI investigation . . . and the legal advice given to prepare a response thereto are protected by the Attorney Client Priv[ilege] doctrine." Afterwards, in its summary of the closed session, the council listed the topics discussed as "[l]egal advice on the FBI investigation . . . and [its] legal implications," "measures to address concerns raised about the Department and the legal practicality and implication thereof, including issues related to the [Law Enforcement Officers' Bill of Rights ("LEOBR")] statute." The Council further reported that it had discussed the following personnel topics: the police chief's resignation and "the events relating thereto, including the vacancy created and the implications of such a vacancy"; "personnel matters . . . related to certain Police Department Personnel"; and "selection of an interim Chief." Additionally, the Council disclosed that it had adopted a motion to ask "Counsel and Law Enforcement Personnel" for an "outside review" of the police department's "Policies, Procedures, and General Orders" and to ask the Maryland Police Training Commission for an audit of the police department's training records.

We find that the legal advice exception applied to legal counsel's advice on the federal investigation into the police department, on issues related to LEOBR, and on the legal practicality and implications of measures that the Council could take. The Council's discussions about particular

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<sup>5</sup> A third set of topics involved the hiring of a city administrator and is not at issue here.

police department employees and the appointment of an interim chief fell within the personnel exception, as would have any discussion about how LEOBR applied regarding the employment or discipline of particular individuals. The request for an audit of training records appeared to have been an exercise of oversight over current operations. Therefore, that discussion fell within the administrative function, as described above, and was not subject to the Act.

The Council's decision to ask counsel and law enforcement personnel to review the police department's policies, procedures, and general orders gives us more pause, particularly because we do not know what purpose the Council intended the review to serve. Going by the description contained in the summary, it seems likely that the Council's action regarding that review went beyond the mere receipt of legal advice and that the discussion had thus strayed into the Council's own consideration of future policy-oriented changes—matters that went beyond oversight over current operations. We find that this portion of the closed session did not constitute an administrative function and exceeded the scope of the legal advice and personnel exceptions. Generally, once a public body has received its counsel's advice on an issue before it, the public body must consider the issue in open session unless an additional exception applies, and has been cited in advance, or unless the discussion is excluded from the Act. 9 *OMCB Opinions* 110, 122 (2014). Quite possibly, the Council's discussion would have fallen within § 3-305(b)(12), which permits public bodies to "conduct or discuss an investigative proceeding on actual or possible criminal conduct." However, the Council did not cite that exception in advance and therefore could not rely on it.

**5. *Allegations that the Council's discussions in its October 3, 2018 closed sessions exceeded the "procurement" exception provided by § 3-305(b)(14)***

The "procurement exception," § 3-305(b)(14), permits a public body to close a meeting to "discuss, before a contract is awarded or bids are opened, a matter directly related to a negotiating strategy of the contents of a bid or proposal," so long as disclosure of the discussion to the public "would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." The exception presupposes an ongoing competitive procurement process. Also, in a rare case where a competitive procurement has been cancelled but will soon be re-initiated, we have stated that the exception could apply to discussions about a stop-gap contract that are so intertwined with the impending procurement that disclosure would harm the public body's ability to participate. See 8 *OMCB Opinions* 8, 14 (2012). In both events, the public body has already decided to procure the goods or services and to embark on a procurement. Reading the exception narrowly, as § 3-305(a) requires us to do, we have stated that the procurement exception "does not extend to all matters of 'negotiation and compromise'; it is limited to the competitive bidding or proposal process." *Id.*, quoting 1 *OMCB Opinions* 73, 84-85 (1994).

Here, the Council invoked the exception to discuss an organization's proposal for renovating a City-owned building and raising the funds to do so. The organization had presented its proposal during a public meeting; the Council had instructed staff to evaluate it; and, according to the response, the Council met in closed session so that the staff could provide its "input regarding the matter and develop a strategy to effectively negotiate with [the organization] regarding their offer." The response states that the Council needed to discuss the offer before accepting or rejecting it and to determine whether "other terms, parties or issues that should be considered." Further, the response explains, if the Council rejected the offer, the disclosure of the discussions would hamper a future procurement

process because potential offerors would have information about the City's prior negotiations. Public bodies have long pointed out the difficulty of negotiating contracts in open session, and we have long pointed out, first, that the process of adopting a contract is expressly subject to the Act as an advisory function, and, second, that the Legislature has not provided a generally-applicable exception that would permit public bodies to perform that function behind closed doors. *See, e.g., 1 OMCB Opinions 233, 234 (1997)* (pointing out that "there is no exception in the Act for 'negotiation issues' as such"). Thus, it is not for us to stretch the procurement exception to contract negotiations that, if unsuccessful, might lead to a decision to hold a procurement sometime in the future. Instead, "for the exception to apply, the public body must be able to identify a tangible connection to a particular procurement in which the public body expects to engage . . . ." 8 *OMCB Opinions* at 15. Accordingly, we find that the Council's discussions about the organization's proposal for the use of the City building exceeded the scope of § 3-305(b)(14).

### **Conclusion**

We find that the Council violated § 3-305(d), regarding the adequacy of its closing statements, § 3-306(c)(2), regarding the incorporation of its closed-session summaries in its open-session minutes, and §§ 3-301 and 3-305(b), regarding the closed-session discussion of matters properly discussed in open session. The Council did not violate the Act's notice requirements. Finally, we commend the Council for providing the public with detailed disclosures about its closed sessions and with streaming video of its meetings; despite the violations we have found, this does not appear to be a public body that conceals from the public the subject matter of its closed sessions. This opinion is subject to the acknowledgment requirement set forth in § 3-211.

Open Meetings Compliance Board

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